

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 07-41124
USDC No. 6:04-CV-71
USDC No. 6:02-CR-11-2

U.S. COURT OF APPEALS
FILED
AUG 18 2008

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

THOMAS TAYLOR

Defendant-Appellant

CHARLES R. FULBRUGE III
CLERK

United States Courts
Southern District of Texas
FILED

AUG 21 2008

Michael N. Milby, Clerk of Court

Appeal from the United States District Court
for the Southern District of Texas

O R D E R:

Thomas Taylor, federal prisoner # 98700-079, moves this court for a certificate of appealability (COA) following the district court's denial of relief on his 28 U.S.C. § 2255 motion. Taylor filed the § 2255 motion to challenge his jury trial conviction on one count of conspiring to possess pseudoephedrine, for which he is serving a 140-month sentence.

A COA may issue only if the movant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a district court denies relief on the merits of a prisoner's constitutional claims, to obtain a COA the movant must

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show that jurists of reason would find the district court's resolution of his constitutional claims debatable or wrong. *Id.*

Taylor claims that his trial counsel rendered ineffective assistance because he did not request a forensics expert to determine drug quantity. He claims that his appellate counsel was ineffective for failing to raise the issue of the lack of a forensics expert and for failing to argue that a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), was required. Taylor has failed to make the showing required to obtain a COA on these claims. See § 2253(c)(2); *Slack*, 529 U.S. at 484.

Taylor claims that his trial counsel was ineffective because he did not request a jury instruction on a lesser-included offense. He also claims that his appellate counsel was ineffective because he did not argue that the failure of the trial court to instruct the jury on a lesser-included offense was plain error.

Taylor did not raise these claims in the district court. This court generally will not consider a claim raised for the first time in a COA application. See *Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Taylor's motion for a COA is DENIED.



EMILIO M. GARZA
UNITED STATES CIRCUIT JUDGE

A true copy
Attest:

Clerk, U. S. Court of Appeals, Fifth Circuit

By 

Deputy

New Orleans, Louisiana

AUG 18 2008